IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

NORTHERN DISTRICT OF CALIFORNIA

BLUE GOOSE MINING COMPANY, a corporation,
Plaintiff in Error,
vs.
NORTHERN LIGHT MINING COMPANY, a corporation,
Defendant in Error.

No. 2880

Brief for Plaintiff in Error.

C. J. LOMEN,
O. D. COCHRAN,
Attorneys for Plaintiff in Error.

METSON, DREW & MACKENZIE,
and E. H. RYAN,
Of Counsel.

Filed this.....day of February, A. D. 1917.

F. D. MONCKTON, Clerk.

By....., Deputy.

The James H. Barry Co., 1122 Mission St., San Francisco

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BRIEF FOR PLAINTIFF IN ERROR.

This is a writ of error sued out of the District Court of Alaska, Second Division, by the defendant (plaintiff in error) from a judgment in the sum of $15,189, together with interest and costs, rendered by said Court against plaintiff in error on an instructed verdict, on the 5th day of August, 1916.

The action was one brought by the Northern Light Mining Company on a foreign judgment obtained against the Blue Goose Mining Company, an Alaskan

corporation, in the Superior Court of the State of California; the action was commenced in June, 1911 (Tr., 43), and judgment was entered March 22, 1912 (Tr., 81).

The Blue Goose Mining Company sought to impeach the judgment for lack of jurisdiction by the Court rendering said judgment as against it, in that it was a corporation organized and existing under the laws of the Territory of Alaska, having no officer or agent or property in the State of California, and doing no business in said State during any of the proceedings had in said action; maintaining that the service upon the pretended agent of said Blue Goose Mining Company was void and that the appearance of attorneys for it in said proceedings was without authority.

The District Court of Alaska refused to allow the introduction of any evidence to show either that the plaintiff in error had no agent or officer in the State of California authorized to represent it, or that it had property in said State, or that the said service upon the President of the Blue Goose Mining Company while he was in the State of California on business other than the business of the plaintiff in error, was void; or that the appearance of attorneys in all proceedings in the case was entirely unauthorized by the Board of Directors of the Company; and over the objection of the plaintiff in error allowed the defendant in error to introduce in evidence the judg-

ment roll of the California court, which failed to show affirmatively jurisdiction in the said Court, not only by service upon an authorized agent of said plaintiff in error, but also that it was doing business in the State of California.

For all of which reasons the plaintiff sued out its writ of error to this Court and assigns the following errors in support of its application for a reversal of said judgment, to wit:

ASSIGNMENT OF ERRORS.

I.

The Court erred in overruling the objection of the defendant to the introduction in evidence at the trial of said cause, of the exemplified copy of Sections 1, 4 and 5 of Article 6 of the Constitution of the State of California, and Section 1920 of the Civil Code of the State of California, said exemplified copies being marked Plaintiff's Exhibit 2 and set forth in full in the Bill of Exceptions filed herein, the certificate to said copies of Sections 1, 4 and 5 of the Article 6 of the Constitution of the State of California, and Section 1920 of the Civil Code of the State of California, being as follows:

STATE OF CALIFORNIA—DEPARTMENT OF STATE.

I, Frank C. Jordan, Secretary of State of the State of California, do hereby certify that I have carefully compared the annexed copies of sections

1, 4 and 5 of Article VI of the Constitution of the State of California, and section 1920 of the Civil Code of said State, now in full force and effect, with the originals on file in my office, and that the same are correct transcripts therefrom, and of the whole thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and have caused the GREAT SEAL of the State of California to be affixed hereto this 15th day of September, A. D. 1915.

FRANK C. JORDAN,
Secretary of State,

By.....Deputy.

(Great Seal of the
State of California.)
(Canceled I. R. S. Ten Cents.) (Tr., 21.)

2.

The Court erred in overruling the motion of the defendant to be permitted to offer evidence preliminary to the acceptance of the Judgment-roll introduced in evidence by the plaintiff showing want of jurisdiction in the court of California over the defendant (Tr., 30).

3.

The Court erred in overruling the objection of the defendant to the introduction in evidence at the trial of said cause of the exemplified copy of the Judgment-roll and Remittitur of the Superior Court of the

State of California, City and County of San Francisco, in the case of *Northern Light Mining Company, a corporation, plaintiff,* vs. *Blue Goose Mining Company, a corporation, defendant,* marked Plaintiff's Exhibit No. 3, and set forth in full in the Bill of Exceptions filed herein (Tr., 30).

4.

The Court erred in admitting in evidence over the objections of the defendant, exemplified copy of notice of appeal and order denying a new trial, being respectively Plaintiff's Exhibits No. 4 and No. 5; said exhibits being set out in full in the Bill of Exceptions filed herein (Tr., 88-9).

5.

The Court erred in admitting in evidence over the objections of the defendant, the copy of the order of the Supreme Court of the State of California, transferring the case to the District Court of Appeal for hearing, being Plaintiff's Exhibit No. 6 set forth in full in the Bill of Exceptions filed herein (Tr., 91).

6.

The Court erred in admitting in evidence over the objections of the defendant, exemplified copy of Order Confirming Judgment, being Plaintiff's Exhibit No. 7, set forth in full in the Bill of Exceptions filed herein (Tr., 95).

7.

The Court erred in sustaining the objection of the plaintiff to the following question asked on cross-examination of the witness Ira D. Orton:

> Q. Now, as far as service upon a foreign corporation is concerned, upon whom can process be served under the Statutes of California? (Tr., 100).

8.

The Court erred in sustaining the objection of the plaintiff to the following question asked the witness J. A. Bachelder:

> Q. State to the Court whether or not their (meaning the Blue Goose Mining Company) business is exclusively in the Territory of Alaska (Tr., 101).

9.

The Court erred in sustaining the objection of the plaintiff to the following question asked the witness J. A. Bachelder:

> Q. Mr. Bachelder, is the defendant corporation engaged in any business in the State of California? (Tr., 101.)

10.

The Court erred in sustaining the objection of the plaintiff to the following question asked the witness J. A. Bachelder:

> Q. Were they (meaning the Blue Goose Mining Company) engaged in any business in the State of California, or did they have any office in the State of California in the year 1911 (Tr., 102).

11.

The Court erred in denying the offer of the defendant to prove by the witness J. A. Bachelder to the effect that the defendant was not engaged in business in the State of California during the year 1911, and had no office of any character in the State of California (Tr., 102).

12.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness J. A. Bachelder:

> Q. Did they (meaning Fink and White, lawyers of San Francisco, California,) represent or have authority to represent the Blue Goose Mining Company during the year 1911, or at all? (Tr., 102).

13.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness J. A. Bachelder:

> Q. Mr. Bachelder, did the defendant corporation at any time in the year 1911, or since that date, or at all, have any property within the State of California? (Tr., 104).

14.

The Court erred in ruling out the testimony of the witness J. J. Cole to the effect that the defendant had no business elsewhere than in the Territory of Alaska (Tr., 109).

15.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness J. J. Cole:

> Q. Now, did the Blue Goose Mining Company, the defendant herein, have any business of any kind in the State of California, prior or subsequent to the 2d day of June, 1911? (Tr., 110).

16.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness J. J. Cole:

> Q. Mr. Cole, on the 2d day of June, 1911, or prior or subsequent thereto, did the defendant cor-

poration own any property or have any office within the State of California, or elsewhere, other than within the Territory of Alaska? (Tr., 110).

17.

The Court erred in denying the offer of the defendant to prove by the witness J. J. Cole that the defendant corporation did not prior or subsequent to the 2d day of June, 1911, have any property within the State of California, nor did it upon or prior or subsequent to such date, have any office within or perform any business within the State of California (Tr., 110-11).

18.

The Court erred in sustaining the objection of the plaintiff to the folloiwng question asked of the witness J. J. Cole:

Q. Did the directors of the Blue Goose Mining Company employ or authorize Messrs. Fink and White, or either of them, to appear as attorneys for them in any litigation in the State of California? (Tr., 111).

19.

The Court erred in sustaining the objection of the plaintiff to the introduction in evidence of the By-laws of the defendant corporation, the same being marked Defendant's Exhibit "B" for identification and which are set forth in transcript (p. 120).

20.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness G. J. Lomen:

> Q. Were they (meaning Fink and White) at that time, that is at any time before or between the 2d day of June, 1911, and the 22d day of March, 1912, attorneys or representatives of the Blue Goose Mining Company? (Tr., 130).

21.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness G. J. Lomen:

> Q. I will put it in a different form: Since you have been a member of the board of directors did the board of directors authorize the employment at any time of Messrs. Fink and White or other counsel to represent the defendant or appear for the defendant in the case in question? (Tr., 131).

22.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness G. J. Lomen:

> Q. Did the board of directors, meeting as a board of directors, at any meeting authorize the employment of Messrs. Fink and White or other

counsel to represent or appear for the corporation in the action in question in the State of California? (Tr., 131).

23.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness G. J. Lomen:

Q. Now state whether or not the defendant corporation has, since you have been a director of that corporation up to the 22d day of March, the date of the entry of this Judgment, *own* any property within the State of California? (Tr., 132).

24.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness G. J. Lomen:

Q. Since you have been a director of the corporation state, if you know, whether or not the defendant corporation has, or did do any business within the State of California prior to the 22d day of March, 1912? (Tr., 132).

25.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness G. J. Lomen:

Q. Did the defendant corporation authorize Messrs. Fink and White to appear or represent

the defendant in the action in the State Courts of California so far as you know as a director of the corporation? (Tr., 132).

26.

The Court erred in denying the offer of the defendant to prove by the witness G. J. Lomen, that he, the said G. J. Lomen, had knowledge of all the acts of the board of directors since the year 1909; that the board of directors at no time authorized the appearance of Fink and White for the defendant in the action in question in the State Courts of California, or to represent the defendant in such action (Tr., 133-4).

27.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness G. J. Lomen:

Q. Just state what your duties were as counsel for the corporation with relation to litigation of the corporation? (Tr., 134).

28.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness G. J. Lomen:

Q. State whether or not there was during the year 1911, or 1912, any agent or representative of the defendant resident of the State of California

who had authority from the board of directors to accept service of process in the State of California issuing from the courts of that State; or who had authority from the board of directors to appear, represent or defend any actions brought against the defendant in the courts of said State of California, or who had authority from the board of directors of the corporation to employ any one to appear, represent or defend actions brought against the defendant within the State of California in the State Courts of California (Tr., 134-5).

29.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness L. Stevenson:

Q. Did the board of directors at any time since you have been secretary of the corporation, authorize the employment of any attorney to represent the defendant in any action in the State Courts of California? (Tr., 147).

30.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness L. Stevenson:

Q. Mr. Stevenson, during the time between the date of your election as a member of the board of directors and secretary of the defendant corporation, and the 22d day of March, 1911, did the defendant have any property within the State of California? (Tr., 147).

31.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness L. Stevenson:

> Q. During such period (meaning between the date of the election of the witness a member of the board of directors of the defendant company and the 22d day of March, 1911) did the defendant corporation have any officer or agent within the State of California who was authorized to receive or accept service of process issuing out of the courts of California? (Tr., 148).

32.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness L. Stevenson:

> Q. Did the defendant during such period (meaning the period between the date of the election of such witness a member of the board of directors and the 22d day of March, 1911) have any agent, representative or officer within the State of California authorized to employ counsel to appear for or represent the defendant in an action brought in the courts of the State of California, or in this particular action brought in the State courts of California? (Tr., 148).

33.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness L. Stevenson:

> Q. During the same period (meaning the period between the election of the witness a member of the board of directors of the defendant and the 22d day of March, 1911), did the defendant do any business within the State of California? (Tr., 148).

34.

The Court erred in denying the offer of the defendant to prove by the witness L. Stevenson that during the time between the date of his election as a member of the board of directors and secretary of the defendant corporation, and the 22d day of March, 1911, the defendant had no property within the State of California, nor agent nor officer within the State of California, authorized to receive or accept service of process issuing out of the courts of California; nor during such period did the defendant have any agent, representative or officer within the State of California authorized to employ counsel to appear for or represent the defendant in actions brought in the courts of the State of California, or in this particular action brought in the courts of California, nor did the de-

fendant, during such period, do any business or have any business within the State of California (Tr., 148-9).

35.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. What is the character of the business in which the Blue Goose Mining Company is engaged? (Tr., 151).

36.

The Court erred in denying the defendant's offer to prove by the witness Jafet Lindeberg that the defendant was engaged in mining exclusively in the Territory of Alaska (Tr., 151-2).

37.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Was the defendant engaged in any business outside of the District of Alaska in the year 1911, or prior thereto? (Tr., 152).

38.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Was the defendant engaged in any business of any character in the State of California during the year 1911, or prior thereto? (Tr., 152).

39.

The Court erred in refusing the offer of the defendant to prove by the witness Jafet Lindeberg that the defendant during the year 1911, or prior thereto, had no officer outside of the Territory of Alaska, or did any business of any character within the State of California.

40.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Prior to the 2d day of March, or the date of the rendition of the judgment in the case at bar in the State Courts of California, did the defendant have any office within the State of California? (Tr., 153).

41.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Now, did the defendant, prior to the date of the entry of this judgment, as alleged in the State Courts of the State of California, or at all, own any property within the State of California? (Tr., 153).

42.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Did the defendant corporation have any officer or agent within the State of California prior to the date of the rendition of the alleged judgment herein sued upon in the State Courts of California upon whom service of process was authorized to be had by the company? (Tr., 153).

43.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Did the defendant, prior to the rendition of the judgment herein sued upon the State Courts of California have any officer or agent within the State of California authorized to do any business on behalf of the defendant in such State? (Tr., 154).

44.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Did the defendant, prior to the rendition of the judgment herein sued upon in the State Courts of California, have any officer or agent authorized by the corporation to employ counsel to represent the defendant in any actions brought in the State Courts of California? (Tr., 154).

45.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Had you any authority from the board of directors of the corporation to appear, defend or answer in that cause (meaning the cause of *Northern Light Mining Company* vs. *Blue Goose Mining Company*) brought in the State Courts of California? (Tr., 154).

46.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Had you any authority from the defendant as President or otherwise, to appear in the action brought by the plaintiff herein in the State Courts of California, or to employ counsel therein to defend such action? (Tr., 155).

47.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Did anyone, to your knowledge, have any authority on behalf of the company, defendant herein, to appear for the defendant in any actions brought against it in the State Courts of California? (Tr., 155).

48.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. What authority from the company did you have to do so (meaning to employ Messrs. Fink and White to appear and represent the Company in the case of *Northern Light Mining Company* vs. *Blue Goose Mining Company*) in the State Courts of California? (Tr., 156).

49.

The Court erred in striking out the evidence of the witness Jafet Lindeberg to the effect that the defendant never filed any copy of its Articles of Incorporation in the State of California, or filed any documents or papers with any of the officers of such State (Tr., 157).

50.

The Court erred in sustaining the objection of the plaintiff to the following question asked of the witness Jafet Lindeberg:

> Q. Did the defendant ever comply with or attempt to comply with the laws of California as to foreign corporations doing business in that State? (Tr., 157).

51.

The Court erred in denying the offer of the defendant to prove by the witness Jafet Lindeberg, that the defendant never filed any copy of its articles of incorporation in the State of California or filed any documents or papers with any of the officers of such State, and never complied with or attempted to comply with the laws of California with relation to foreign corporations doing business in that State, nor ever had any license of, or office in the State of California, that the defendant never had any office in the State of California nor did any business in the State of California (Tr., 158).

52.

The Court erred in instructing the jury "to find a "verdict in favor of the plaintiff and against the "defendant for the sum of $11,661.20, with interest "thereon from the 2d day of March, 1912, at the rate "of seven per cent. per annum, amounting in the ag- "gregate to the sum of $14,189.00" (Tr., 161).

ARGUMENT.

Plaintiff in error has assigned numerous errors made by the Court below. The majority of these errors are based upon the exclusion of all evidence offered to show the lack of jurisdiction of the California courts to render the judgment sued upon in Alaska, in that

(1) No process had ever been personally or otherwise served upon it in said action, as it was not at the time of the institution of said action or at any other time domesticated under the Statute or doing business in California, or owning any property or having any office therein; (2) That it had no agent or officer in California authorized to accept service of process or otherwise represent it; and (3) That it had *not* authorized the attorneys who appeared in said action to represent it.

These errors embrace two propositions of law, the answers to which we submit are controlling in this case.

FIRST—Are the recitals in the record of a judgment obtained in a sister State against a foreign corporation conclusive, when sued upon in the domicile of the judgment debtor?

SECOND—Where an attorney professes to appear and represent such foreign corporation in defending such action, does that render the judgment binding upon

it in the absence of service of process or may his lack of authority be shown in the subsequent action on such judgment?

I.

Before we begin to discuss these propositions of law, an examination into the facts of this record as to jurisdictional averments and denials might well be made. What are the issues involved in the pleadings on the judgment in this respect?

The complaint after alleging the bringing of the action in the California courts and the due issuance of summons, further alleges that it (complainant) "duly served the Blue Goose Mining Company *per-* "*sonally* in said City and County of San Francisco, " State of California, by serving upon said *defendant* "*personally* in said City and County" a copy of said summons, etc.; the due appearance by verified answer, etc., and alleges further that the California courts had full and complete jurisdiction of both said plaintiff and said defendant to said action (Par. IV, Complt. Tr., 3-4).

The amended answer denies any knowledge of the bringing of the action by filing a complaint. . . . on the 2nd day of June, 1911, "and that on said date *a summons was duly issued in said cause*" and *"demands strict proof thereof"* (Am. Ans., Par. III, Tr., 8). Denies that the summons was duly or at all served in the City of San Francisco or elsewhere by

serving upon it personally or otherwise, and denies the appearance of the Blue Goose Mining Company in said action or that it filed a verified answer; and denies that the California courts "had full, complete or any jurisdiction" over it to render the judgment sued on and demands strict proof as to all these and other allegations of Paragraph IV (Am. Ans., Par. III, Tr., 8-9). And then goes on to plead:

> "Further answering said complaint defendant alleges that at the time said action was commenced, as set forth and alleged in plaintiff's complaint and from that time up to, and at the time said supposed judgment was rendered, as alleged in plaintiff's complaint, the said defendant was a corporation duly organized under the laws of the Territory of Alaska, and was a citizen of the said Territory of Alaska and a resident therein and not elsewhere *and was not served with process, and had no notice of the pendency of said alleged action in said Superior Court for the City and County of San Francisco, State of California, and that it, said defendant, never appeared thereto or therein in person or by attorney and did not at the time of the alleged commencement of said action, or the pretended service of summons therein or the entry of said alleged judgment, live within the State of California, or have within said State of California, any agent, officer, representative or employe authorized to accept service of process, or upon whom service of process could be made, or authorized to appear in said alleged action or otherwise, nor did the defendant during any of said times have any property within the State of California or had any business in said State, or within the*

jurisdiction of the said Court alleged to have rendered the said judgment" (Am. Ans., Par. III, Tr., 10-11).

Here the issue is squarely made as to the *jurisdiction* of the courts of California to render the judgment complained of.

It will be noted that the amended answer demands strict proof of the allegation as to the filing of the complaint and the issuance of the summons and the service thereof (Tr., 8-9). And it will be further noted that the judgment roll introduced in evidence over the objection of the plaintiff in error (Assignment of Error, 3, Tr., 30) contains no copy of Summons or return thereon of service upon the Blue Goose Mining Company, nor is there in the record any evidence of any service of process upon any officer of the corporation. J. Lindeberg, the President of the Blue Goose Mining Company, who attempted to act for the company, was questioned as to whether he had ever been served with process and testified as follows:

> Q. Now, Mr. Lindeberg, were you served with any summons or process in this case by any officer in the State of California?
>
> A. *I have no recollection of ever having been served with any process in that case* but if I was served it would be after my return in the Fall of 1911. I was at that time President of the defendant company and a member of its Board of Directors. The Blue Goose Mining Company is an Alaskan corporation (Tr., 151).

An answer was, however, filed in the case by attorneys employed by Mr. Lindeberg (Tr., 156).

The position of the plaintiff in error is that Mr. Lindeberg had no authority to represent it as its agent or officer in California, to accept process for it or employ attorneys; further that it had never complied with the laws of California respecting foreign corporations, doing business in California, and that it never had done business in California and owned no property therein.

As we have above stated the question of jurisdiction was squarely raised by the issues on these propositions.

The position taken by the Court below as shown by its rulings on the evidence, as being not competent, was that the judgment roll was conclusive on all recitals therein, including jurisdiction (Assignments Nos. 9, 10, 11, 13, 14, 15, 16, 17, 23, 24, 28, 30, 31, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 49, 50, 51).

But no question of jurisdiction was raised in the California courts and so the question of jurisdiction was not concluded.

An examination of the findings of fact and conclusions of law show a recital as follows:

> "It appearing to the Court that the defendant *had been regularly served with a copy of the summons and complaint* in said cause, in the City and County of San Francisco, State of California, and that the defendant had duly appeared by filing a demurrer and answer in said action and *had not*

> *objected to the jurisdiction* of the said Court, the Court proceeded to hear the cause. . . . that the defendant is and at all times involved herein was a corporation organized and existing under and by virtue of the laws of the District of Alaska" (Tr., 73-4).

But although the plaintiff had alleged that the Blue Goose was "doing business" in California, the Court significantly fails to make a finding to this effect and makes no finding that it has any property in the State. Therefore there is no presumption as to jurisdiction by reason of the existence of this latter fact.

So we have a recital that a foreign corporation "was regularly served" with process, but no finding that it was "doing business" in California. How can a foreign corporation be regularly served with process in the absence of either of these two latter conditions, or in the absence of a showing that jurisdiction was obtained through constructive service by reason of its ownership of property within the territorial limits of the State of California?

It is elementary that no State has any jurisdiction over persons or property beyond its territorial limits, although possibly it may affect persons beyond its boundaries by virtue of their *ownership of property* within its territorial jurisdiction.

> *Story's Conflict of Laws,* Chap. 2;
> *Wharton's International Law,* pt. 2, Chap. 2.

The Court below ruled out all questions propounded by the plaintiff in error to show that it had no property in the State of California (Assignments of Errors, Nos. 13, 16, 30, 34, 36, 41), and the judgment roll showed negatively no doing of business within the State of California by the plaintiff in error.

In the case of *Kendall* v. *American Automatic Loan Company,* 198 U. S., 477, 49 L. Ed., 1133-1135, the question of the validity of a subpoena in equity issued by a Federal Circuit Court upon the resident treasurer of a foreign corporation *not doing business* in the State was in question upon the appeal from an order setting aside the service.

In holding the order of the lower Court to be correct, Justice Peckham says:

> "Regarding the case as properly here, the question is whether the service made upon the treasurer of the appellee corporation was a valid service upon the corporation itself. We think it was not. It is perfectly apparent that the corporation was, at the time of the service on the treasurer, *doing no business whatever within the State of New York,* and that it had never done any business there since it was incorporated in the State of West Virginia. While we have lately held that, in the case of a foreign corporation, the service upon a resident director of the State where the service was made was a good service where that corporation was doing business within that State (*Pennsylvania Lumbermen's Mut. F. Ins. Co.* v. *Meyer,* 197 U. S., 407, ante, 810, 25 Sup. Ct. Rep., 483), yet such service is insufficient for a court to

acquire jurisdiction over the corporation where the company was not doing any business in the State, and was situated like this company at the time of the service upon the treasurer. *Conley* v. *Mathieson Alkali Works,* 190 U. S., 406, 47 L. ed., 1113, 23 Sup. Ct. Rep., 728."

In *Henning* v. *Planters' Ins. Co.,* 28 Fed., 440, quoting from page 444, it was said:

". . . The courts of another State will not give effect to the judgment unless it appear by the record that the court had potential jurisdiction over the person of the defendant, and if the record show that,—which this does not,—then the defendant may contradict it by proof, in order to save his rights of 'natural justice,' whatever that may mean. *Whart. Confl. Laws* (2d Ed.), Sec. 646, *et seq.; Moulin* v. *Insurance Co.,* 24 N. J. Law, 222; S. C., 25, N. J. Law, 57. And it will be found from the cases cited that, beginning with *Pennoyer* v. *Neff,* 95 U. S., 714, the Supreme Court has vigorously laid hold of this rule with a deliberate purpose to protect in the most thorough manner all non-residents against judgments where there is no personal service, except so far as the State rendering them has property within its borders to satisfy them by its own execution of them. Elsewhere, except to that extent, they are utterly void. This case of *St. Clair* v. *Cox, supra,* is one of the series, and it establishes, as an element of this protection, that, when foreign corporations are sued, the *record* must show *affirmatively,* not only that there was service upon an 'agent,' but that the corporation was in fact 'doing business' in the State. This latter fact being shown, the Court will assume, in the absence of proof to the con-

trary, that the party returned served as 'agent' was in fact the representative of the corporation, but not otherwise."

It is true foreign corporations may give their consent that service of summons may be made by service upon an appointed agent within a foreign State, and such service may sustain the jurisdiction of a court in an action on a personal judgment based thereon. But unless such agent is designated and served and consent deduced therefrom, no foreign corporation can be said to be within the jurisdiction of a court of a foreign State (unless such corporation waives such service in the absence of a designated agent) by appearance in court voluntarily. *And whether such designated agent has been so served; or whether the corporation has no agent and has appeared voluntarily or by attorney and waived process,* are matters of fact which *go to the jurisdiction* of the Court which rendered the judgment and may be inquired into when such judgment is sued upon in the domicile of the corporation defendant. And the doctrine that the jurisdiction of the Court rendering a judgment may be inquired into when a suit is brought in the *courts of another State* on that judgment does not depend on the authority of adjudicated cases. It rests as has been held upon a principle of natural justice. No person should be condemned without the opportunity to make a defense, and to show that the accusation against him is unfounded; and if a person has a

right to *defend an action* upon a judgment rendered against him in a sister State he has the further right to show a want of jurisdiction.

The case of *Starbuck* v. *Murray,* 5 Wend. (N. Y.), 148, (21 Am. Dec., 172), is most often cited approvingly in the later decisions of both Federal and State Courts for the reasoning there laid down on the propositions involved.

In that case the record was set forth and it did not show the fact, which was alleged as matter of estoppel—the appearance of both defendants—judgment was therefore given against the replication setting up the estoppel.

The Court say:

> "But it is strenuously contended that if other matter may be pleaded by the defendant, he is estopped from asserting anything against the allegation contained in the record. It imports perfect verity, it is said, and the parties to it can not be heard to impeach it. It appears to me that this proposition assumes the very fact to be established, which is the only question in issue. *For what purpose does the defendant question the jurisdiction of the court? Solely to show that its proceedings and judgments are void, and therefore the supposed record is not in truth, a record.* If the defendant had not proper notice of, and did not appear to the original action, all the State courts with one exception, agree in opinion that the paper introduced as to him is no record; *but if he can not show, even against the pretended record, that fact on the alleged ground of the uncontrollable verity of the record, he is deprived of his defense*

by a process of reasoning that is, to my mind, little less than sophistry. The plaintiffs, in effect, declare to the defendant, the paper declared on is a record, because it says you appeared, and you appeared because the paper is a record. This is reasoning in a circle. The appearance makes the record uncontrollable verity, and the record makes the appearance an unimpeachable fact. The fact which the defendant puts in issue (and the whole current of State court authority shows it to be a proper issue) is the validity of the record, and yet it is contended that he is estopped by the unimpeachable credit of that very record from disproving any one allegation contained in it. *Unless a court has jurisdiction, it can never make a record which imports uncontrollable verity to the party over whom it has usurped jurisdiction, and he ought not therefore to be estopped, by any allegation in that record, from proving any fact that goes to establish the truth of a plea alleging a want of jurisdiction. So long as the question of jurisdiction is in issue, the judgment of a court of another State is, in its effect, like a foreign judgment; it is prima facie evidence; but for all the purposes of sustaining that issue, it is examinable into to the same extent as a judgment rendered by a foreign court. If the jurisdiction of the court is not impeached, it has the character of a record, and for all purposes should receive full faith and credit.*

. . . . . .

"My views in relation to the estoppel by the record are already expressed. *To say that the defendant may show the supposed record to be a nullity by showing a want of jurisdiction in the court which made it, and at the same time to estop him from doing so, because the court have inserted in the record an allegation which he*

offers to prove untrue, does not seem to me to be very consistent. Under the operation of such a rule, a court could always sustain its jurisdiction if it had any solicitude to do so; or rather, the party who had the benefit of its decision, and who by the practice of most tribunals is intrusted with making the record, would not fail to put it beyond the power of his opponent to show a want of jurisdiction.

. . . . . .

"A more direct authority on the other side of the question is found in the case of *Aldrich* v. *Kinney,* 4 Conn., 380 (10 Am. Dec., 151). There the defendant was permitted to show that he had no notice of the suit, and did not appear, although it appeared by the record produced that he had appeared by attorney. This is a direct authority against the principle by which it is attempted to sustain the replication in this case. *If the allegation in the record of an appearance by an attorney is examinable into in an action on the judgment, and may be disproved, I can not see why the allegation of an appearance of the party in person is not in like manner questionable.* I am, therefore, of opinion that the demurrer to the plaintiff's replication is well taken."

The judgment against the replication setting up the estoppel was reversed.

Therefore we contend it is settled law that

THE RECITALS OF A RECORD AS TO JURISDICTIONAL FACTS MAY BE CONTRADICTED IN THE COURTS OF ANOTHER STATE WHERE THE RECORD IS PRESENTED.

The rule is now settled beyond possibility of change or construction, that in an action on a judgment of a court of a sister State, it is open to the defendant to *deny* the jurisdiction of the court rendering the judgment over his person or the subject matter of the suit.

Sec. 897, *Black on Judgments,* p. 1330.

It is well settled doctrine that if the court which renders judgment has no jurisdiction over the parties or the subject matter, *it is always open* to the defendant to show this fact when he is sued on a judgment in another State. In such a case he is not to be confined to the single plea of *nul tiel* record, *but is at liberty to plead the want of jurisdiction specially.*

Sec. 887, *Black on Judgments,* p. 1317.

Since a judgment rendered in one of the States is entitled to the same faith and credit in every other State which it receives at home, it follows that, in an action upon such judgment, no defenses are ad-

missible except such as could be set up in an action on the same subject in the State of its rendition and *except the defense of want of jurisdiction and perhaps fraud.*

Sec. 881, *Black on Judgments,* p. 1313.

In the case of *Cole* v. *Cunningham,* 32 L. Ed., 538-541, Chief Justice Fuller, in discussing the "Full Faith and Credit" clause contained in Article IV, Section 1, of the Constitution and Sec. 905 of the Revised Statutes of the United States, says:

> "This does not prevent an inquiry *into the jurisdiction of the court in which a judgment is rendered to pronounce the judgment, nor into the right of the State to exercise authority over the parties or the subject matter,* nor whether the judgment is founded on and impeachable for a manifest fraud. The Constitution did not mean to confer any new power on the States but simply to regulate the effect of their acknowledged jurisdiction over persons and things within their territory. It did not make the judgments of the States, domestic judgments to all intents and purposes but only gave a general validity, faith and credit to them as evidence."

See also:

St. Clair v. *Cox,* 106 U. S., 350, 27 L. Ed., 222;
Grover & Baker Machine Co. v. *Radcliffe,* 137 U. S., 287, 34 L. Ed., 670;
Thompson v. *Whitman,* 18 Wall., 457, 21 L. Ed., 897;

Cooper v. *Newell,* 173 U. S., 555, 43 L. Ed., 808;

Knowles v. *Logansport Gaslight & Coke Co.,* 19 Wall., 58, 22 L. Ed., 70;

Goldey v. *Morning News,* 156 U. S., 521, 39 L. Ed., 518;

Kendall v. *American Automatic Loan Co.,* 198 U. S., 477, 49 L. Ed., 1133-35;

Conley v. *Mathieson Alkali Works,* 190 U. S., 406, 47 L. Ed., 1113;

Bell v. *Bell,* 181 U. S., 173-175, 45 L. Ed., 804-7;

U. S. v. *American Bell Telephone Co.,* 29 Fed., 17-35;

Henning v. *Planters' Ins. Co.,* 28 Fed., 440;

Citizens Bank v. *Brooks,* 23 Fed., 21;

Allen v. *Downs,* 22 Fed., 805;

Graham v. *Spencer,* 14 Fed., 603;

Eureka etc. Co. v. *California Ins. Co.,* 130 Cal., 153;

Greenzweig v. *Strelinger,* 103 Cal., 278.

The main issue in the case was as to whether the plaintiff in error had an agent upon whom process in this case could have been served in California; and the plaintiff in error was foreclosed of all right to introduce any evidence as to such issue by the position taken by the Court below in its rulings (Assignments of Error 28, 31, 32, 34, 39, 40, 42, 43, 49,

50, 51), and which position we believe must have been based upon the assumption that the recitals in the judgment roll admitted in evidence were conclusive. No other explanation of the rulings of the Court can be arrived at. We submit that these rulings constitute reversible error, for the judgment roll is, as is shown by the cases cited, merely *prima facie* evidence of its contents which may be contradicted by parol.

In the case of *Thompson* v. *Whitman,* 18 Wall., 457, 21 L. Ed., 897, Judge Bradley in discussing the question of the contradiction of the record, said:

> "If it is once conceded that the validity of a judgment may be attacked collaterally by evidence showing that the Court had no jurisdiction, it is not perceived how any allegations contained in the record itself, however strongly made, can effect the right to so question it. The very object of the evidence is to invalidate the paper as a record. If that can be successfully done, no statements contained therein have any force. If any such statements could be used to prevent an inquiry, a slight form of words might always be adopted so as to effectually nullify the right of such inquiry. Recitals of this kind must be regarded like asseverations of good faith in a deed which avail nothing if the instrument is shown to be fraudulent. The records of the domestic tribunals of England and some of the States it is true, are held to import absolute verity as well in relation to jurisdictional as to other facts in all collateral proceedings. . . . But, as we have seen, *that rule has no territorial force.* . . . . On the whole, *we think it clear that the jurisdic-*

tion of the Court by which a judgment is rendered in any State may be questioned in a collateral proceeding in another State, notwithstanding the provisions of the fourth article of the Constitution and the law of 1790 and notwithstanding the averments contained in the record of the judgment itself."

In the case of *Knowles* v. *Logansport Gaslight & Coke Co.,* 19 Wall., 58, 22 L. Ed., 70, this principle was reaffirmed where it was held that although the record might show a return of the sheriff to the effect that the defendant had been *personally* served with process, the latter had the right to deny and disprove it. In that case the Court say:

"But the defendant also offered to prove by himself and Haney that neither of them had ever in fact been served with process and that in consequence the Court never as to them, acquired jurisdiction of the person. As this subject has been lately considered in *Thompson* v. *Whitman,* . . . it is unnecessary to go over the subject again. *In our opinion the defendant has a right to show by proof, that he had never been served with process, and that the Circuit Court of Cass County never acquired jurisdiction of his person. As this was refused him on the ground that the evidence was inadmissible, the judgment must be reversed.* Where defendant resides in the State in which the proceedings are had, service at his residence and perhaps other modes of constructive service may be authorized by the laws of the State. *But in the case of non-residents* like that under consideration, personal service cannot be dispensed with unless the defendant voluntarily appears."

In the later case of *Cooper* v. *Newell,* 173 U. S., 555, 43 L. Ed., 808, in holding that the question of the jurisdiction of the State court to render a judgment then under consideration in a United States Circuit Court in the same State, might be inquired into by that Court, the Supreme Court again reaffirms the doctrine of *Thompson* v. *Whitman,* and say:

> "In *Thompson* v. *Whitman,* 18 Wall., 457, a leading case in this Court, it was ruled that 'neither the constitutional provision that full faith and credit shall be given in each State to the public acts, records and judicial proceedings of every other State, nor the acts of Congress passed in pursuance thereof, prevents an inquiry into the jurisdiction of the Court by which a judgment offered in evidence was rendered;' that 'the record of a judgment rendered in another State may be contradicted as to the facts necessary to give the Court jurisdiction; and if it be shown that such facts did not exist, the record will be a nullity, notwithstanding it may recite that they did exist,' and that 'want of jurisdiction may be shown either as to the subject matter of the person, or in proceedings *in rem,* as to the thing.'"

In the case of *Goldey* v. *Morning News,* 156 U. S., 521, 39 L. Ed., 518, Justice Gray said:

> "It is an elementary principle of jurisprudence that a court of justice cannot acquire jurisdiction over the person of one who has no residence within its territorial jurisdiction except by actual service of notice, within the jurisdiction upon him, *or upon some one authorized to accept service on his*

behalf or by his waiver by general appearance or otherwise of the want of due service. . . . So a judgment rendered in a court of one State against a corporation *neither incorporated nor doing business within the State* must be regarded as of no validity in the courts of another State, or of the United States, *unless service of process was made in the first State upon an agent appointed to act there for the corporation, and not merely upon an officer or agent residing in another State, and only casually within the State and not charged with any business of the corporation there."*

While in the oft quoted case of *St. Clair* v. *Cox,* 106 U. S., 350, 27 L. Ed., 222, 226, where the record of the judgment (as here) failed to show that the judgment debtor was *doing business* in the State where action was brought when service was made on its agent, the *record was held properly excluded,* the Court saying:

"It is sufficient to observe that we are of opinion that when service is made within the State upon an agent of a foreign corporation, it is essential in order to support the jurisdiction of the Court to render a personal judgment that *it should appear somewhere in the record,* either in the application for the writ, or accompanying its service in the pleadings or the finding of the Court that the *corporation was engaged in business in the State.* The transaction of business by the corporation in the State, general or special, appearing, a certificate of service by the proper officer on the person who is its agent there, would in our opinion, be sufficient *prima facie* evidence that the agent represented the Company in the business. *It*

would then be open when the record is offered in evidence in another State, to show that the agent stood in no representative character to the Company. That his duties were limited to that of a subordinate employe, or to a particular transaction, or that his agency had ceased when the matter in suit arose."

II.

Now as to the effect of the appearance of plaintiff in error by attorney in the California Courts.

We do not question the conclusiveness of the record as to the fact of the attorneys' appearance, but claim such appearance is only *prima facie* evidence of their authority to act, where, as in this case, an issue has been raised as to the service of process on plaintiff in error and as to the authority of attorneys to so appear.

If any presumption arises by reason of such appearance as to their right to so do, such presumption may be rebutted by showing a want of authority of the person pretending to employ such attorneys.

We were, through the rulings of the Court below, denied the right to show the lack of authority of J. Lindeberg to act as the agent of the Blue Goose Mining Company in the State of California, or to accept service of process or to appear and defend any action in its behalf. We were denied the right by the rulings of the Court below to show that the

Blue Goose Mining Company did not hold any property in the State of California.

If we had been permitted to go behind the recitals of the judgment roll in this respect, as was our legal right, and had maintained our contention, surely an appearance of attorneys employed by an unauthorized agent would be of no avail to bind the Blue Goose Mining Company. It would seem to require no argument that if Lindeberg was not such a person upon whom process could be served, or who could accept service or appear in such action on behalf of the Blue Goose Mining Company (which we were denied the right to show), then he would have no authority to employ attorneys and by such action confer upon the attorneys a greater right in the matter of such appearance than he, himself, had.

If then we had been permitted to show, as was our further legal right, that the only authority for the appearance of the attorneys in this case was their employment by a pretended agent of the corporation, whose acts were *ultra vires,* the presumption that they were rightfully in court representing the plaintiff in error, arising in favor of such attorneys as officers of the Court, would fall.

If the record states that an attorney appeared, this is simply *prima facie* evidence of the authority to appear and which presumption the defendant is at

full liberty to overthrow by showing that he never authorized the attorney to appear for him.

Shelton v. *Tiflin,* 6 How. (U. S.), 163; 12 L. Ed., 387;
Cooper v. *Newell,* 173 U. S., 555; 43 L. Ed., 808;
Hatfield v. *King,* 184 U. S., 164; 46 L. Ed., 481;
Hall v. *Mendenhall,* 21 Wall., 452;
Citizens Bank v. *Brooks,* 23 Fed., 21;
Graham v. *Spencer,* 14 Fed., 603;
Section 896, *Black on Judgments;*
Shumway v. *Stillman,* 6 Wend. (N. Y.), 447;
McDermott v. *Clary,* 107 Mass., 501.

" 'The judgment of a court of general jurisdiction in any State in the Union,' said the Court in New York at an early day, is 'equally conclusive upon the parties in all the other States as in the State in which it was rendered. This, however, is subject to two qualifications. First, if it appear by the record that the defendant was not served with process and did not appear in person or by attorney, such judgment is void; and second, *if it appears by the record that the defendant appeared by attorney, the defendant may disprove the authority of such to appear for him'* " (*Shumway* v. *Stillman,* 6 Wend. (N. Y.), 447).

Section 896, *Black on Judgments,* p. 1326.

In the case of *Shelton* v. *Tiflin, supra,* this principle was early recognized. There the U. S. Supreme Court say:

> "Had the Circuit Court which rendered the judgment jurisdiction of the case? The plaintiffs were citizens of Virginia, John M. Perry was a citizen of Louisiana, and L. P. Perry of Missouri. No process was served upon L. P. Perry, nor does it appear that he had notice of the suit until long after the proceedings were had. But there was an appearance by counsel for the defendants, and defense was made to the action. This being done by a regularly practicing attorney, it affords *prima facie* evidence at least, of an appearance in the suit by both defendants. Any individual may waive process and appear voluntarily. John M. Perry acted in some matters as the agent of L. P. Perry, but it does not appear that he had authority to waive process and defend the suit. . . . The appearance was the act of the counsel and not the act of the Court. Had the entry been that L. P. Perry came personally into Court and waived process, it could not have been controverted. But the appearance by counsel who had no authority to waive process or to defend the suit for L. P. Perry may be explained. An appearance by counsel under such circumstances, to the prejudice of a party, subjects the counsel to damages; *but this would not sufficiently protect the rights of the defendant. He is not bound by the proceedings and there is no other principle which can afford him adequate protection."*

In the case of *Cooper* v. *Newell, supra,* the United States Supreme Court quote approvingly *Vilas* v.

Plattsburgh & Montreal Railroad, 123 N. Y., 440, 9 L. R. A., 844, and say:

> "And so in New York where a judgment of a court of that State was drawn in question which had been entered against a non-resident, who was not, during the pendency of the proceedings, within the jurisdiction of the State . . . Andrews, J., delivering the opinion of the Court (N. Y.) said:
> "'It is well settled that in an action brought in our courts on a judgment of a court of a sister State, the jurisdiction of the Court to render the judgment may be assailed by proof that the defendant was not served and did not appear in the action, *or where an appearance was entered by an attorney that the appearance was unauthorized, and this even where the proof directly contradicts the record.*'"

The case of *Hatfield* v. *King,* 184 U. S., 164, 46 L. Ed., 481, was an appeal from a decree quieting title to lands claimed by the defendants. One of the appellants moved the Supreme Court for a rule against the attorney who had appeared for her below, stating she had not been served with process, that counsel unauthorized entered her appearance and after having so wrongfully acted failed to take proper steps to protect appellant's rights.

The U. S. Supreme Court say:

> "Before any proceedings could rightfully be taken against the defendants, it was essential that either they be brought into Court by service of process or that a lawful appearance be made in

their behalf. Confessedly they were not served with process and they now deny the right of counsel to have entered an appearance for them."

The Supreme Court sent the case back with instructions to the Circuit Court to set aside the decree as well as the *appearance* of the defendants and to proceed thereafter in accordance with law and after a full investigation of the charges of misconduct on the part of the attorneys.

In the case of *Citizens Bank* v. *Brooks,* 23 Fed., 21, in an action upon a judgment of a sister State, the defendant set up that no attorney or other person had been authorized to appear for him in the original action, non-residence and non-service of process. Replication by plaintiff that defendant had knowledge of suit, procured attorneys and defended and paid the attorneys. Defendant traversed and joined issue on this.

The Court say:

"The plaintiff claims that the record of the appearance in the cause of attorneys of the court for the defendant is conclusive of their right to appear for him, and that evidence to the contrary should not be considered. There are cases which perhaps go to this length. *Mills* v. *Duryee,* 7 Cranch. 481; *Lapham* v. *Briggs,* 27 Vt., 26. But it is now well settled in the courts of the United States that want of jurisdiction to bind the person may be shown in an action upon the judgment against the person. *Thompson* v. *Whitman,* 18 Wall., 457; *Knowles* v. *Gaslight Co.,* 19 Wall., 58; *Hall* v. *Lansing,* 91 U. S., 160; *Graham* v. *Spencer,* 14 Fed. Rep., 603. The fact that the attorneys

entered an appearance for the defendant is, perhaps, conclusively shown by the record, *but that they had authority in fact, or any more than that they assumed to have authority, is not shown at all by it.* The presumption that all was rightly done arising from their being officers of the court, is admitted to, and doubtless does, cast the burden upon the defendant of showing that the appearance was without his authority.

. . . . . .

"If he (defendant) was heard there upon the trial he has no right to be heard again upon the questions involved except upon appeal, but is bound. That he had notice of the suit, however, full and formal, *out of* the jurisdiction would not bind him. He could not be compelled to appear by anything done without the jurisdiction. *Bischoff* v. *Wethered,* 9 Wall., 812. Therefore taking his deposition would not bind him. The other party had the right to take it in order to obtain a judgment to bind the property attached, but he could not be made a party personally in that manner; if he could, the jurisdiction of courts could be extended without their territorial limits by merely resorting to that proceeding.

. . . . . .

"As the plaintiff had, and was entitled to, no proceedings to compel his personal appearance, it could not be had without he knowingly and voluntarily yielded it, and he could not ratify the assumption of others to appear and submit his case for him without knowledge of what they had assumed to do for him. *This is not intended to imply that what was done without jurisdiction over his person could be made binding upon him by any ratification after the judgment. Jurisdiction over the person at the time of the judgment*

is necessary to its validity as a personal judgment. A defendant might probably compensate anyone who had, without his knowledge, undertaken the defense of a suit against him which might bind his property and failed and not subject himself to the consequences of making the judgment bind him personally, when before it would only bind his property."

We submit that these cases are decisive of the right of the plaintiff in error to have had a hearing upon the issue of non-service of process, upon the fact of no authorized agency in California to act in the matter of the defense of the action and upon the question of the right of the attorneys to represent it in the case.

We offered in evidence the testimony of J. A. Bachelder, a director since 1911 of the plaintiff in error; of J. J. Cole, Vice-President and Director since 1909 or 1910; of G. J. Lomen, a Director since 1908 or 1910, and General Counsel of the Blue Goose Mining Company, and of L. J. Stevenson, a Director since 1911 and Secretary and Treasurer of the Company (constituting, with J. Lindeberg, the Board of Directors), to meet the issue presented by the amended answer on these propositions of fact, all of which was ruled out as incompetent.

We further offered the testimony of J. Lindeberg, the President of the Company, to prove that neither at the time the action was brought or at any other time did the plaintiff in error do business other than

in the Territory of Alaska, that it had no office outside of Alaska, nor in the State of California, that it owned no property in California, nor had it any agent in California at the date of the rendition of the judgment or prior thereto authorized to accept process or to employ counsel in actions or in this action in the Courts of California; all of which was ruled out.

In this respect we wish to call attention to the following testimony of J. Lindeberg:

> "Q. Had you any authority to *employ counsel* in that case to *appear* and *represent* the company, or to *appear* and represent the Company therein *other than your general authority as President* of the Company?
> "A. None" (Tr., 156-7).

But what his *general* authority as President of the Company consisted of, was barred from the record by the ruling of the Court, holding that the By-Laws of the Company were not admissible in evidence (Assignment of Error 19, Tr., 120, *et seq.*). *Non constat* from this answer his authority might have been broad enough to have warranted his employment of attorneys and appearance in said action. As a matter of fact the By-Laws show no such power. Art. V, Sec. 3, of the By-Laws, provides:

> "The president shall be the general executive officer of the corporation. He shall preside at all meetings of the directors and stockholders,

shall prepare and present at each annual stockholders' meeting a report of the business of the corporation for the preceding year, and a statement of its present condition, shall sign all stock certificates and written contracts of the corporation, and perform generally all the duties usually appertaining to the offices of president of a corporation. He shall have general charge (subject to the control of the Board of Directors) of the business affairs of the corporation, may sign and indorse bonds, bills, checks and promissory notes on behalf of the corporation, and may borrow money in its name; but he shall have no power without the previous consent of the board of directors to incur any debt on behalf of the corporation in excess of the sum of Five Hundred Dollars, or without such consent to bind the corporation by any obligation involving a liability in excess of said sum. He shall at all times keep the directors advised as to the affairs of the corporation."

It will be seen that he is to "have general charge *(subject to the control of the Board of Directors)* of the *business affairs* of the corporation . . ."

And it is expressly provided that "he shall have " no power *without* the *previous consent* of the Board " of Directors to incur *any debt on behalf of the cor-* " *poration in excess* of the sum of *five hundred dol-* " *lars,* or *without such consent,* to *bind* the corpora- " tion *by any obligation involving* a liability *in excess* " of such sum."

Lindeberg testified that he paid the attorneys he had employed acting upon his "general authority as

President"; that he paid them *$1,000.* That he paid it out of the Pioneer Mining Company funds and *years afterward,* in *1914* or *1915*, he charged it up to the Blue Goose Mining Company.

It is clear from the provisions of Section 3 of Article V of the By-Laws that Lindeberg had no authority to appear and represent or employ attorneys to appear and represent the plaintiff in error in any litigation in the Courts, and that while he had *general charge* of the business of the corporation such charge was *subject to the control* of the Board of Directors.

We submit this evidence was most material on the question of Lindeberg's authority. But the Court ruled the By-Laws out and on the suggestion and objection of Mr. Orton, would not permit them to be *even read* when the offer to introduce was made (Tr., 120-121).

This case was tried before a jury, and this evidence was material and should have gone to the jury as a question of fact to be considered by them in addition to all the other evidence which the Court erroneously excluded. We submit the exclusion of these By-Laws was reversible error.

The Court below, as we have suggested, tried this case upon the theory that the record of the judgment of the California Court imported absolute verity in all respects, including jurisdiction. Upon that theory only could it have given an instruction to the jury

to return a verdict for the defendant in error, which instruction we also assign as reversible error. In fact we submit that the record in this case is a tissue of errors based upon the false theory of the case adopted by the Court below upon the suggestion of the defendant in error.

For all of which reasons we ask that the case be reversed.

C. J. LOMEN,
O. D. COCHRAN,
Attorneys for Plaintiff in Error.

METSON, DREW & MACKENZIE,
and E. H. RYAN,
Of Counsel.